Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION)

Case No.6352/14

Before: The Hon. Mr Justice Binns-Ward

In the matter between:

STAFFMED CC Applicant

And

THE MEC FOR HEALTH (WESTERN CAPE) First Respondent
THE WESTERN CAPE DEPARTMENT OF HEALTH Second Respondent

JUDGMENT DELIVERED: 23 JUNE 2014

BINNS-WARD J:

[1] The applicant was contracted by the provincial department of health to provide appropriately qualified persons to undertake locum duties at hospitals administered by the department. It was required to verify the identity and qualifications of the persons it made available in terms of the contract. It transpired that one of the persons it made available, and whose services were used by the department as a stand-in medical doctor, was, in fact, not the person he had represented himself to be and was not registered with health professions council. When this information came to light the department informed the applicant that it was suspending its use of the applicant's services pending an investigation into the matter. The department also issued instructions that none of the hospitals or facilities under its administration was to avail of the applicant's services. The applicant considered that the action taken by the department was unwarranted. An exchange of correspondence having failed to resolve matters, the applicant then instituted proceedings as a matter of urgency for

an interdict directing the department to continue to use its services pending the determination of the investigation.

[2] The department opposed the application. The matter was adjourned for hearing in the Fourth Division on 18 June. The relief sought by the applicant in terms of its notice of motion was thereafter overtaken by events when the applicant gave notice that it was cancelling the contract on the grounds of the applicant's material breach when it provided an unqualified doctor for locum service. The applicant thereupon filed a notice of intention to amend its notice of motion to claim interim performance of the contract pending the determination of an application to be instituted for the review and setting aside of the department's decision to cancel it. The department objected to the amendment.

[3] The notice of objection set up three grounds for resisting the amendment: the first was that no basis for the relief sought in terms of the proposed amended notice of motion had been laid in the founding papers, and the department had already answered the case it had originally been asked to meet; the second was that the department would be prejudiced by not having had the opportunity to deal with the allegations in support of the amended relief that had been founded for the first time in averments made in the applicant's replying affidavit; and the third was that the replying affidavit did not provide grounds for the contemplated review and that in the circumstances no basis had been provided for the interim relief to be sought in terms of the proposed amended notice of motion. In the result only the application for the amendment was argued when the matter was called on 18 June because counsel for the applicant realistically conceded that were the amendment to be allowed, the applicant would wish to supplement its papers and the department would have to be afforded an opportunity to answer the new case.

[4] Counsel for the department argued that no point would be served by allowing the amendment because the review that the applicant appears to wish to institute is misconceived in law. For the purpose of his argument the respondent's counsel assumed that the basis of the contemplated review is an alleged breach of the procedural fairness requirements in terms of s 3 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). This was a reasonable approach in the context of the only indication of the nature and basis of the review given in the applicant's papers being the averments in paragraph 6 of its replying affidavit. The tenor of the applicant's counsel submissions confirmed that, at least as currently advised, the applicant is indeed going to contend that the cancellation of the contract manifested the exercise of public power, and that public, as distinct from purely private, law principles were

implicated in any act of cancellation of the contract. An applicant seeking a judicial review should set out its grounds clearly, including specifically identifying any statutory grounds upon which it relies. That much has been reiterated by the courts in relation to PAJA-based reviews in a number of judgments; see especially *Bato Star Fishing (Pty) Ltd v Minister of Environment Affairs* 2004 (4) SA 490 (CC), at para 27 and *Cele v South African Social Security Agency and 22 Related Cases* 2009 (5) SA 145 (D), at para 45 and consider generally Hoexter, *Administrative Law in South Africa*, Second Edition, at 517-518. This requirement should also be satisfied in papers in which interim relief is sought pending the determination of a contemplated review; for a court needs to be properly informed in such a context of the precise nature and basis of the contemplated review in order to be able to properly assess, as best as it is able, the applicant's prospects in the review. That, after all, is the basis upon which the strength or weakness of the right which the applicant seeks to protect by interim interdictal relief falls to be determined; cf. e.g. *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1995 (2) SA 813 (W), at 832I-833B; *Ladychin Investments (Pty) Ltd v South African National Roads Agency Ltd and Others*, 2001(3) SA 344 (N) at 357C-E*; Van der Westhuizen and Others v Butler and Others* 2009 (6) SA 174 (C), at 182C-E; *Camps Bay Residents Ratepayers Association and Others v Augoustides and Others* 2009 (6) SA 190 (WCC), at para 10, and *Capstone 556 (Pty) Ltd v Commissioner, South African Revenue Services and Another, Kluh Investments (Pty) Ltd v Commissioner, South African Revenue Services and Another* 2011 (6) SA 65 (WCC) at para 53. The applicant's papers notably fell short of compliance with the exhortations in *Bato Star* and other judgments.

[5] Paragraph 6 of the replying affidavit, which, as mentioned, affords the only indication in the applicant's papers of the nature of the contemplated review, reads as follows:

> I was in fact informed for the first time that the Applicant's agreement with the Respondents has been cancelled when reading the Answering Affidavit herein. I am not provided with the courtesy of being informed as to when this decision was made and by whom. I can however say that I was not informed and/or involved in any form of process in this regards whereby I was provided with an opportunity to advance reasons to why the agreement not be cancelled. Mention is made in the Respondents' Answering Affidavit that written correspondence will be provided to the Applicant pertaining to the cancellation. No such documentation has been received by Applicant.

[6] Counsel for the department submitted that the weight of authority is against the notion that public law is implicated in the cancellation by an organ of state of a contract with a

private party when the organ of state acts in terms of common law contractual principles, rather than in terms of a statutory provision. Counsel submitted that by cancelling the contract in reaction to a material breach by the applicant the department was acting in terms of generally applicable contractual principles. He found support for his argument in para 18 of the appeal court's judgment in *Government of the Republic of South Africa v Thabiso Chemicals (Pty) Ltd* 2009 (1) SA 163 (SCA), in which it was held as follows:

> What remains are observations originating from comments by the court a quo which seem to support the notion that the contractual relationship between the parties may somehow be affected by the principles of administrative law. These comments gave rise to arguments on appeal, for example, as to whether the cancellation process was procedurally fair and whether Thabiso was granted a proper opportunity to address the tender board in accordance with the *audi alteram partem* rule prior to the cancellation. Lest I be understood to agree with these comments by the court a quo, let me clarify: I do not believe that the principles of administrative law have any role to play in the outcome of the dispute. After the tender had been awarded, the relationship between the parties in this case was governed by the principles of contract law (see eg *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others* 2001 (3) SA 1013 (SCA) (2001 (10) BCLR 1026) at para 18; *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA) ([2006] 1 All SA 478) at paras 11 and 12). The fact that the tender board relied on authority derived from a statutory provision (ie s 4(1)(eA) of the State Tender Board Act) to cancel the contract on behalf of the government, does not detract from this principle. Nor does the fact that the grounds of cancellation on which the tender board relied were, inter alia, reflected in a regulation. All that happened, in my view, is that the provisions of the regulations - like the provisions of ST36 - became part of the contract through incorporation by reference.

[7] I have difficulty in reconciling the dicta in para 18 of *Thabiso Chemicals* with the court's judgment in *Metro Inspection Services*. In the latter case the court held that the fact that the conclusion of the contract in question was regulated by statute - as are all procurement contracts by organs of state - did not mean that the organ of state was exercising a public power when it subsequently cancelled the contract on common law contractual principles. The court also held, however, that the position in that matter would have been different if the cancellation had been effected in terms of a regulatory provision that had been equally available. The court treated of this at para 20 of its judgment as follows:

> Counsel for the first respondent submitted that in the light of the provisions of reg 22(1) of the Financial Regulations for Regional Services Councils R1524 of 28 June 1991 the contract was not a purely commercial contract and that the cancellation thereof, therefore, constituted 'administrative action'. Regulation 22(1) provides as follows:
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> '22(1) If the council is satisfied that any person, firm or company -

(a) is executing a contract with the council unsatisfactorily;

(b) has offered, promised or given a bribe or other remuneration to the chairman, a council member, an official or an employee of the council in connection with the obtaining or execution of a contract;

(c) has acted in a fraudulent manner or in bad faith or in any other unsatisfactory manner in obtaining or executing a contract with any Government department, provincial administration, public body, company or person, or that he or it has managed his or its affairs in such a way that he or it has in consequence been found guilty of an offence;

(d) has approached a chairman, council member, an official or an employee before or after tenders have been invited for the purpose of influencing the award of the contract in his favour;

(e) has withdrawn or amended his tender after the specified date and hour;

(f) when advised that his tender has been accepted, has given notice of his inability to execute the contract or fails to execute or sign the contract or fails to execute or sign the contract to furnish the security required,

the council may, in addition to any claim which it may have in terms of reg 20 and in addition to any other legal recourse, decide that any contract between the council and such person, firm or company shall be cancelled and that no tender from such person, firm or company shall be considered for a specified period.'

In my view, there can be no question that, had the appellant purported to cancel the contract in terms of the provisions of reg 22(1), it would have been exercising a public power which would have constituted 'administrative action' in respect of which a fair procedure in terms of s 33 of the Constitution would have required compliance with the *audi* rule. That would have been the case even if the provisions had been incorporated into the contract (see *Zenzile* at 36G - I). However, the appellant did not purport to cancel the contract on any of the grounds referred to in reg 22. It purported to cancel the contract, not on the ground of being satisfied of the existence of any of the circumstances referred to in reg 22, but on the ground that substantial fraudulent claims had actually been submitted and that such fraudulent claims constituted a material breach of contract entitling the appellant to cancel in terms of the law of contract.

The view expressed in the last section of paragraph 20 of the judgment in *Metro Inspection Services*, after the quotation of regulation 22, appears, on the face of it, to be in direct conflict with the import of paragraph 18 of the court's judgment in *Thabiso Chemicals*.

[8] The judgment in *Thabiso Chemicals* is also remarkable for the absence of any mention, in relation to the matter dealt with at para 18 thereof, of the court's earlier judgment in *Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 460 (SCA), which significantly qualified the purely private law contractual approach reflected in the *Metro Inspection Services* judgment. In *The quest for clarity: An examination of the law governing*

public contracts 2011 (128) SALJ 172, Calli Ferreira suggests that 'In failing to even mention *Logbro* or its rulings in its judgment, the SCA's decision in *Thabiso Chemicals* represents a return to a 'purely contractual' approach which completely sidelines the role of administrative law after a contract has been validly concluded. Its failure to refer to *Logbro*, a decision of the same court and one which importantly interpreted *Cape Metropolitan Council*, which was relied on by the court, is peculiar and seems to be a rejection of the approach taken in *Logbro*.'[1] The writer proceeded 'The contradictory approaches taken by the courts leave the law unclear and the application of administrative law to the exercise by the government of its private law rights remains controversial'.

[9] I am unconvinced that the judgment in *Thabiso Chemicals* does indeed imply a considered rejection of the approach in *Logbro.* As apparent from the passage quoted above, the court did refer to *Steenkamp NO v Provincial Tender Board* at paras 11 and 12. The latter judgment contains an apparently approving footnote reference to *Logbro* at para 12. The footnote was appended to the following statement by Harms JA at the end of para 12 of the judgment in *Steenkamp*: 'Once the tender is awarded, the relationship of the parties is that of ordinary contracting parties, although in particular circumstances the requirements of administrative justice may have an impact on the contractual relationship'. In my view there can be no quibble, however, with the observation by Ferreira that the appeal court's judgments, taken together, leave the current state of the law in this area unclear.[2]

[10] What may be distilled with some measure of certainty from the jurisprudence, I think, is that rules of procedural fairness may be applicable to the cancellation of by state bodies of contracts concluded with private persons in certain circumstances. I am not called upon in determining the application to amend the notice of motion to decide whether the cancellation at issue in the current case would qualify as such. It is inappropriate that I should express any views in that regard at this stage, particularly in the context of the applicant's counsel's indication that the matter should be postponed so that the applicant's papers can be supplemented in respect of the new basis for the application and to afford the department the opportunity to answer the reformulated application. I am, however, satisfied that there might

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[1] At p. 188.

[2] See also Geo Quinot in *'Toward effective judicial review of state commercial activity*' (2009) 3 TSAR 436, at 439, where the writer noted 'South African law has probably gone further than most other common law systems in accepting generally that the adjudication and award of all public tenders amount to administrative action subject to judicial review. However, judicial review remains controversial in South Africa in relation to other state commercial decisions, e.g. the cancellation of a contract', and the discussion, with reference to other Supreme Court of Appeal and Constitutional Court jurisprudence, in Hoexter (op cit supra at para 4) at pp.447-451, where reference is made to '[t]he ambivalence exhibited in the Supreme Court of Appeal'.

in principle be scope for the applicant to advance an arguable case in the contemplated review and that it would therefore be inappropriate to refuse the amendment on the grounds that the reformulated application is absolutely untenable in law.[3] Notwithstanding what was said in the passage in *Thabiso Chemicals* relied on by the department, the High Court appears to have space to manoeuvre in the context of contradictory judgments in the Supreme Court of Appeal; see *R v Sillas* 1959 (4) SA 305 (A), at 311A and *Makambi v MEC for Education, Eastern Cape* 2008 (5) SA 449 (SCA); [2008] 4 All SA 57, at para 28.

[11] It remains to be considered, however, whether the court's discretion should be exercised in favour of the applicant by allowing the amendment in the context of the case that the applicant now wishes to pursue not having been founded in the founding papers. The vague and unsatisfactory formulation in its replying affidavit of the new course that the applicant wishes to take is a factor to be taken into account in such consideration.

[12] Counsel for the department submitted that the applicant should have commenced with a fresh application when it became apparent that the relief sought in terms of the notice of motion in the current proceedings had been rendered redundant by the altered factual situation. In my view there is much to commend that approach. The only question that remains relevant in respect of the application originally launched is that of costs. Had the applicant acted as counsel for the department contends it should have, there would have been no need for a replying affidavit, or a notice of amendment. The outstanding issue of costs in the current application could have been consolidated for determination in a fresh application brought on the grounds that the applicant currently wishes to pursue. The opposed amendment application heard on 18 June would have been unnecessary. The course instead adopted by the applicant had the inherent disadvantage that a postponement of the matter on 18 June was unavoidable because of the need for it to supplement its papers even if the amendment were granted and the need for the respondent to be afforded the opportunity to answer the new case – an answer to which the applicant may no doubt wish to reply. All in all, if the amendment were granted the matter would probably not become ripe for hearing until after the exchange of at least six sets of affidavits; and in circumstances in which a material portion of the content of the first three sets of those affidavits had been rendered irrelevant, save as to costs.

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[3] There might also be scope for a party in the applicant's position to argue, on the basis of *dicta* in judgments such as *Barkhuizen v Napier* 2007 (5) SA 323 (CC) and *Breedenkamp and Others v Standard Bank Ltd* 2009 (5) SA 304 (GSJ), for the implication of rules of reasonableness and fairness in the private law context, even though the applicant does not appear, thus far, to have considered such an approach.

[13] It is not interests of the efficient administration of justice, or, indeed, of the parties, for the matter to proceed on the basis that granting the application for the amendment would involve. There is nothing to prevent the applicant from instituting the new application it wishes to pursue on fresh papers, if so advised, and to request the court in that application to determine the costs of the current application, which it would otherwise seek to withdraw. Whether it would be viable to adopt such a course having regard to the remaining executory period of the contract in issue[4] and the timeframes that would be inherent in a review application conducted even on an expedited timetable is obviously something for the applicant to consider. The time frame considerations would in any event have applied even were the amendment to have been allowed.

[14] In the circumstances the following order is made:

The application to amend the notice of motion is dismissed with costs.

A.G. BINNS-WARD

Judge of the High Court

[4] The contract would have expired at the end of December 2014, in just over six months' time.